REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES / NO (2) OF INTEREST TO OTHER JUDGES: YES / NO (3) REVISED.	CASE NUMBER: 19952/2012
SIGNATURE **DATE**	

In the matter between:

MOMENTUM GROUP LIMITED **PLAINTIFF**

And

MARIUS DE WAAL **FIRST DEFENDANT**

ALIDA DE WAAL **SECOND DEFENDANT**

JUDGMENT

WINDELL, J:

INTRODUCTION

[1] Momentum instituted action against the first defendant (De Waal) for the repayment of commissions advanced, (Claim 1), and damages for breach of a restraint of trade contract (Claim 2).

[2] The claim against the second defendant is based on a deed of suretyship in terms of which the second defendant bound herself as surety and co-principal debtor in favour of Momentum for all De Waal's liabilities.

[3] De Waal defended both claims and also instituted a counterclaim. The counterclaim was withdrawn at the commencement of the trial.

[4] The defendants conceded liability in respect of Claim 1 and tendered payment of the amount of R476 972.91 together with interest thereon at the rate of 14 % per annum, from 28 September 2013 to date of the tender. They also tendered the costs on a party and party scale. Momentum insists on costs on an attorney-client scale. The only outstanding issue in respect of Claim 1 is the scale of costs.

[5] The primary issue for determination as far as Claim 2 is concerned, is whether a valid agreement of restraint of trade existed, and, if so, whether De Waal breached the restraint of trade agreement.

[6] Merits and quantum have been separated in terms of Uniform Rule 33(4).

BACKGROUND

[7] Momentum and De Waal concluded a *"Financial Planner Agreement"* on 18 March 2008. In terms of this agreement De Waal was appointed as a representative of Momentum. During the currency of the agreement he was obliged to place all applications for policies and insurance products with Momentum, or any of its product houses or companies with which Momentum concluded a general agency agreement.

[8] De Waal was, what is colloquially referred to in the industry, as a "tied agent". He was contractually restrained from having an interest or to be employed or act as an intermediary or financial planner for any business enterprise or venture relating to the insurance and investment industry. He undertook to treat as confidential any information and knowledge to which he gained access by virtue of his appointment. He also agreed not to disclose such information and knowledge to any of Momentum's competitors and any other organisation, or to utilise it for his personal gain without the written consent of Momentum. The *"Financial Planner Agreement"* was for an indefinite duration but could be terminated by either party after fourteen days written notice. It contained no restraint of trade provision.

[9] Two years later, on 15 April 2010, Momentum and De Waal concluded a further written agreement, the *"Advance Payment Agreement"*, in terms of which Momentum paid De Waal an amount of R350 000 in lieu of future production and discounting of future incentives in the form of deferred bonuses and share options. This agreement contained several restraint of trade provisions.

[10] On 23 May 2011 De Waal terminated the "*Financial Planner Agreement*" with the prescribed notice in terms of Clause 9.5. De Waal subsequently entered into an agreement with Discovery Holdings Limited (Discovery) in terms of which he was appointed an intermediary,[1] with effect from 1 June 2011.

[11] Momentum alleges that De Waal breached the terms and conditions of the "*Advance Payment Agreement*" in that subsequent to the termination of the "*Financial Planner Agreement*", and until 8 May 2013, he *"solicited and/or enticed existing policy holders and/or clients of Momentum to terminate their policies and/or products with Momentum and replace the terminated policies and/or products with policies/products of Discovery."* As a result it is alleged that Momentum suffered damages due to the non-receipt of premiums following termination of the policies.

THE ADVANCE PAYMENT AGREEMENT

[12] Claim 2 is based on the "*Advance Payment Agreement*", concluded between the parties on 15 April 2010. It is common cause that in terms of this agreement an amount of R350 000 was advanced to De Waal. The cash advance was conditional. De Waal had to, *inter alia*, continue working for Momentum in terms of the "*Financial Planner Agreement,*" for a period of five years, from the effective date (15 April 2010). The conditions of the cash payment are stipulated in Clause 8 of the "*Advance Payment Agreement*" which reads as follows:

"8.1 The payment of the cash amount is conditional upon Marius De Waal being

[1] As defined by the Long-Term Insurance Act 52 of 1998.

contractually obligated to Momentum to:

> *8.1.1 continue in terms of the Financial Planner Agreement for a period of five years from the effective date of this Agreement;*
>
> *8.1.2 submit new business to a minimum amount of 2 (two) million Production Credits per annum over the 5 (five year) period from effect of this Agreement..."*

[13] Clause 8.1.1 provides that the contractual obligation to continue working for Momentum for five years would be in terms of the "*Financial Planner Agreement*". The "*Financial Planner Agreement*" was never amended to introduce such a provision. Clause 9.5 of the "*Financial Planner Agreement*", which entitles De Waal to terminate his employment with Momentum with 14 days' notice, remained unchanged. Despite Clause 8.1.1 providing for an obligation to continue working for five years, Clause 9.3 of the "*Advance Payment Agreement*" made provision for De Waal to terminate his employment before the five years stipulated in Clause 8.1.1, on condition that he pays back the advance.

[14] It is common cause that the condition in 8.1.1 was not met in that De Waal terminated his employment with Momentum in terms of the *"Financial Planner Agreement"* in May 2011. It is further common cause that he complied with Clause 9.3 in that he paid back the R350 000 plus interest.

The restraint

[15] As stated above, the "*Advance Payment Agreement*" contained several restraint of

trade provisions.[2] In support of Claim 2, Momentum only relies on the restraint of trade in Clause 7.1 which reads as follows:

> *"Restraint of Trade*
>
> *7.1 Marius De Waal acknowledges that the disclosure of any confidential information to third parties may result in financial prejudice to Momentum, and Marius De Waal undertakes to accordingly not to:*
>
> > *7.1.1 For a period of 60 (sixty) months 5 (five) years from the fulfilment of the condition in Clause 8.1.1, whether on his own or on behalf of any other person, close corporation, partnership or company solicit information or business from, deal with or supply any person...with whom Momentum has dealt with at any time;*
> >
> > *7.1.2 Approach any Momentum financial advisor or Momentum clients with the intent of enticing such financial advisor or client to terminate their relationship with Momentum.*
> >
> > *7.1.3 ..... **(this clause was deleted and initialled by all parties involved)***
>
> *7.3 Marius De Waal acknowledges that the restraints imposed upon him in terms of this clause ("Restraint of Trade") are reasonable as to subject matter, area and duration and are reasonably necessary in order to preserve and protect the goodwill applicable to Momentum and/or the Group Business."*

[16] In the particulars of claim, Momentum pleaded that Clause 7.1 of the agreement did

[2] Clauses 6.2.1; 6.2.2 and Clause 7

not reflect the true intention of the parties and ought to be rectified. It was pleaded that the words in Clause 7.1.1 namely *"the fulfilment of the condition in Clause 8.1.1"* should be changed to read *"the **non-fulfilment** of the condition in Clause 8.1.1"*. Momentum abandoned the claim for rectification and relied on the agreement as it stands.

[17] Momentum conceded during argument before me that De Waal was not in breach of Clause 7.1.1. Momentum therefore only relies on the restraint contained in Clause 7.1.2, which is a separate restraint of trade provision. The question is whether Clause 7.1.1 and Clause 7.1.2 can be severed, and if possible, whether Clause 7.1.2 would be enforceable?

[18] Momentum contended that Clause 7.1 provided for two separate and distinct obligations (7.1.1 and 7.1.2) and should be read disjunctively. De Waal, on the other hand, contended that on a proper interpretation of the *"Advance Payment Agreement"* the entire agreement is subject to the condition set out in Clause 8.1.1, namely that De Waal must be contractually bound to Momentum to act as a financial planner for a period of five years. If De Waal was not so bound, so the argument went, there are no legal obligations which arise from the agreement.

[19] The interpretation of a document is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses. There is therefore no onus in matters of interpretation.[3] In *Natal Joint Municipal Pension Fund v Endumeni*

[3] *KPMG v Securefin Ltd* 2009 (4) SA 399 SCA, at [39] and [40]

Municipality,[4] Wallis JA set out the proper approach to be adopted when interpreting documents. The learned Judge remarked as follows:[5]

> *'[W]hatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' [Footnotes omitted.]*

[20] Clause 7 must be read in context. Clause 7.1.1 prohibits De Waal, for a period of five years (from the fulfilment of the condition in 8.1.1) from soliciting information or business from, or to deal with any person with whom Momentum has dealt with at any time. In terms of Clause 7.1.2 De Waal undertakes not to approach Momentum clients with the intention of enticing such clients to terminate their relationship with Momentum. In Clause 7.3 De Waal acknowledges that the restraints imposed upon him in terms of

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[4] *2012 (4) SA 593 (SCA)*
[5] At 604 -605

Clause 7 "*are reasonable as to* ***subject matter, area and duration"*** *(my emphasis)* and are reasonably necessary to preserve and protect the goodwill applicable to Momentum.

[21] In *Reeves & Another v Marfield Insurance Brokers CC & Another*,[6] the object of a restraint of trade term was described as follows:

> *'The legitimate object of a restraint is to protect the employer's goodwill and customer connections (or trade secrets) and the restraint accordingly remains effective for a specified period (which must be reasonable) after the employment relationship has come to an end.'*

[22] Both parties in the present matter are in agreement that Clauses 7.1.1 and 7.1.2 are restraint of trade provisions. If Clauses 7.1.1 and 7.1.2 are read disjunctively, as proposed by Momentum, the restraint in Clause 7.1.2 will be excessively wide and vague. It has no time period, and in theory the undertaking not to entice Momentum clients, lasts in perpetuity. The area of the restraint is also excessively wide (no area is mentioned), and it will presumable cover the entire territorial jurisdiction of the Republic of South Africa or any other country Momentum conducts business in. Clause 7.3 clearly states that De Waal acknowledges that Clause 7 (the entire clause) is reasonable as to subject matter, area and duration. If Clause 7.3 is read in conjunction with the remainder of Clause 7.1 (as one should), it was clearly the intention of the parties that Clause 7.1.2 should be subject to the time period and condition in Clause

[6] 1996 (3) SA 766 (A) at p 772- F

7.1.1.

[23] I agree with counsel for the defendants that there is also a sense of business efficacy in reading Clauses 7.1.1 and 7.1.2 conjunctively. The "*Financial Planner Agreement*" did not contain any restraint provision. Prior to receiving the advance payment, De Waal was therefore not restrained. The restraint came as part of the attempt to secure his services for five years. The mutual obligations (on Momentum to pay and on De Waal to be restrained) only came into existence on condition that he bound himself to work for five years or that he actually worked five years. If he did not work five years then he would not be entitled to the money and it must be paid back. Similarly Momentum would not be entitled to the restraint.

[24] Momentum in any event did not seek a reading down of the terms of the restraint provision in Clause 7.1.2 so as to make it reasonable and, hence, enforceable. It is trite that it is not the duty of the court to whittle down an unreasonable covenant in the restraint of trade until it becomes reasonable, or to write a new contract for the parties.[7] Momentum elected to seek to enforce the full extent of the restraint in Clause 7.1.2 on its papers. The parties have failed to define exactly the limits of the area of business and the time period for the purpose of the restraint. A court cannot make a contract for the parties and save an unenforceable restraint by engaging in judicial "*plastic surgery*".[8]

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[7] *The Concept Factory v Heyl* 1994 (2) SA 105 (T)
[8] *National Chemsearch (SA) (Pty) Ltd v Borrowman and Another* 1979 (3) SA 1092 (T) at 1117A

[25] In *Sunshine Records (Pty) Ltd v Frohling and Others*[9], it was held as follows:

> *"The nature, extent and duration of the obligations and restrictions imposed on the respondents, together with the absence of any real reciprocal obligation on the part of any other party, created such an extreme and serious restraint on the respondents' freedom to pursue their profession that a court should, in my view, refuse to enforce the contract."*

[26] The restraint clauses in the *"Advance Payment Agreement"* were clumsily drawn. A court can only give effect to a restraint agreement that is recognisably one that the parties agreed to.[10] Clause 7.1.2 does not provide for a time period or for a specific area. If interpreted on its own, Clause 7.1.2 is overbroad and unenforceable, and cannot be given effect to.

[27] On a proper interpretation of the *"Advance Payment Agreement"* the entire agreement is subject to the condition in 8.1.1. Momentum admitted that the condition was not met. De Waal terminated his employment with Momentum and paid back the advance. The consideration or *quid pro quo* for being bound to the restraint, namely the cash payment, has fallen away along with the restraint obligations.

[28] Even if I am wrong in this respect, and Clause 7.1.2 is enforceable, I am in any event not convinced that De Waal breached Clause 7.1.2.

[29] It is common cause between the parties that pursuant to the termination of the

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[9] 1990 (4) SA 782 (A)
[10] *Sunshine Records* at 796E-G; *Advtech Resourcing* at paras 43-45).

"*Financial Planner Agreement*", De Waal took up employment with Discovery, a competitor of Momentum in the insurance and medical aid industry. Certain of De Waal's former clients, who held policies with the Momentum, subsequently cancelled their policies with Momentum, and took up policies with Discovery. De Waal remained the financial advisor to these clients. Momentum alleges that De Waal enticed Momentum clients to terminate their relationship with Momentum.

[30] According to the Oxford dictionary "entice" is defined as ' to persuade by offer of pleasure'. Within the context of the agreement it implies that De Waal must have taken active steps to procure the change in policies. This would include, at the least, that De Waal initiated contact with the client and took active steps to persuade the client to terminate his or her policy, in favour of a Discovery policy.

[31] The only direct evidence presented by Momentum to prove that De Waal solicited or enticed business away from Momentum was that of De Waal himself, whom Momentum called as a witness. De Waal denied having solicited or enticed clients to terminate their policies.

[32] He testified that in over 99% of the cases where clients cancelled Momentum policies and took out Discovery policies, the client had initiated contact with him. He stated that he made use of the Astute system, an up-to-date record of all insurance and medical aid policies issued by all of the large insurance companies in South Africa, to access information about potential clients before meeting them. There was therefore no need to make use of Momentum's data base of customer information when providing

advice to clients pursuant to joining Discovery. The Astute system was a far more reliable method of sourcing information regarding a particular client's existing insurance and medical aid policies and is accessible by financial advisors with the consent of the individual client. He denied consulting with Momentum clients with the intention to persuade them to switch policies from Momentum to Discovery. De Waal testified that he gave proper advice, that it was compliant with the provisions of the Financial Advisory and Intermediary Service Act [11] and the General Code of Conduct.

[33] Momentum contended that the large number of policies that was replaced, the striking similarity in the reasons given for why it was replaced, and the absence of any evidence of proper financial advice are sufficient to show that De Waal engaged in incentive driven churning.

[34] Momentum did not call a single client to provide direct evidence to the effect that De Waal solicited or enticed them to cancel their Momentum policies. Momentum called De Waal as a witness, who testified the exact opposite. De Waal's evidence is uncontested and is fatal to Momentum's claim.

[35] Momentum was unable to prove that De Waal enticed clients to change their policies. It follows that there can be no breach by the mere fact that De Waal was contacted by former Momentum clients and asked to continue to provide financial advice to them.

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[11] Act 37 of 2002

COSTS

[36] The "*Financial Planner Agreement*" provides that should the plaintiff institute any legal proceedings against De Waal for the purpose of exercising its right in terms of the agreement De Waal shall be liable for plaintiff's costs on the scale as between attorney and an own client. Momentum accepts that an order for attorney and own client costs would achieve nothing more on taxation than cost on the scale as between attorney and client.

[37] The court has a discretion in awarding costs in litigation. Policies were terminated as a result of which Momentum was deprived of premiums in respect of which the commissions were advanced. De Waal defended Claim 1 and instituted a counterclaim. No material grounds were advanced for the court to exercise its residual discretion in not giving effect to the agreement between the parties. In the circumstances of this case an order for costs on an attorney-client scale is justified.

[38] The defendants during March 2014 tendered payment of the amount claimed in Claim 1, together with interest, and costs on a party and party scale. In my discretion costs are allowed on an attorney-client scale up until the date of tender.

[39] In the result the following order is made:-

Claim 1:

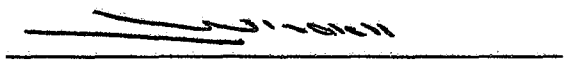
1. Payment of the amount of R476 972.91 together with interest thereon at the rate

of 14% per annum compounded monthly in arrears from 28 September 2013 to date of payment against the first and second defendant;

2. Costs on the scale as between attorney and client to the date of tender.

Claim 2:

1. The plaintiff's claim is dismissed with costs, including the costs of two counsel.



L WINDELL

JUDGE OF THE HIGH COURT

Attorney for Plaintiff:	Gerings Attorneys
Counsel for Plaintiff:	Advocate J.F. Steyn
Attorney for defendant:	Brian Bleazard Attorneys
Counsel for defendant:	Advocate N. Redman SC Advocate G. Fourie
Date matter heard:	9 February 2016 to 15 February 2016, 26 June 2017 and 28 June 2017
Judgment date:	22 September 2017